ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DIVISION III

CA 05-896

MARCH 15, 2006

DAVID PARKS and DEBRA LYNN PARKS
APPELLANTS

V.

MICHAEL R. VIERLING and KAREN E. VIERLING
APPELLEES

APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT
[NO. CV-2002-170-4]

HONORABLE GORDON WEBB, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

This is an appeal from a judgment rendered in Baxter County Circuit Court against appellants David and Debra Lynn Parks[1] in a lawsuit for breach of a construction contract filed by appellees Michael and Karen Vierling. Appellant is in the business of building and selling houses. Appellees purchased a house built by appellant in July 1999, closing on the house when it was near completion. In February 2000 and the following months, the crawl space of the house was repeatedly infiltrated with water upon each heavy rain. Despite appellant's initial attempts to fix the water problem, it persisted, and appellant abandoned those efforts by fall 2000. Appellees filed suit in May 2002, and appellant defended on the ground that any water problem was due to alterations on the property done by appellees. After a two-day bench trial, the trial judge took the case under advisement, ultimately finding that appellees had proven by a preponderance of the evidence that appellant failed to properly provide for adequate drainage during construction of the house; that appellant

[1]For ease of reference, we will refer herein only to David Parks as the primary appellant. Mr. Parks was the actual builder/contractor on this construction project and the person with whom appellees communicated.

breached the implied warranties of merchantability and fitness for a particular purpose; that appellant was responsible for resulting damages that were $10,450 in costs to repair the drainage problem; and that appellant was responsible for appellees' attorney fees in the amount of $11,470.36 plus court costs. The judgment was entered on February 4, 2005, and a timely notice of appeal followed. Appellant appeals arguing that (1) the finding that appellant was responsible for the drainage problem is not supported by a preponderance of the evidence, and (2) the award of the full requested attorney fee constitutes an abuse of discretion. We affirm.

We initially set forth the relevant testimony and evidence presented in this bench trial. The parties stipulated that appellant was a builder and the vendor of this home, which was sold to the first occupants, appellees. They further stipulated that the defects became apparent within the first year of ownership.

Appellee Michael Vierling testified that in late 1999 after moving into the house, he hired Mr. Dickerson to pour concrete in a small triangular area, covering an area of dirt abutting the house to create a patio. This area was bordered by the sidewalk leading to the front door. By the early months of 2000, appellee noticed a substantial amount of water in the crawl space underneath the house, so he called appellant. Appellant came to the house and knocked out a hole low in the foundation, placing a small drain pipe into the hole. This did not solve the problem. About a month later, appellant came out and installed a curtain drain along the east side of the house, which purportedly emptied into a gravel pit at the end. A few weeks after that, appellant came back to replace the top soil over the drain and lay seed and straw atop the soil. The new trench did not solve the problem, because with each rain more water entered the underneath crawl space. The next time appellant came out to the house, he brought a civil engineer, Mr. Huett, with him. Mr. Huett believed that a buried

curtain drain was useless unless it exited to "daylight." Mr. Huett also suggested that appellant grade the land away from the house to divert run-off. In June 2000, appellant said he "fixed" a down-spout on the house by placing the down-spout into a PVC pipe already placed underneath the sidewalk. In July 2000, appellant re-opened the curtain drain and refilled it, and he attempted to grade the dirt on the property. None of these actions stopped the crawlspace from filling with water upon each rain.

With that, appellant contacted Mr. Huett to file a formal engineering report. Mr. Huett recommended a curtain drain to be installed along the north side, or front, of the house and to be attached to the east-side drain. Mr. Huett also recommended an additional four-foot extension of the concrete along the garage. Appellant installed a north-sided drain but did no more. Appellant said he stopped working on this problem from and after September 2000. Appellant had spent approximately $4700 toward the drainage problem.

The flooding continued, and it appeared to appellee that the water came from the back of the garage. Appellee said he spent over $700 in rental equipment to repeatedly extract the water and dry the crawl space. Because the crawl space was "in a constant state of wet" growing moss, fungus, mushrooms, and harboring frogs, appellee contacted another engineer, Mr. Willett, to fix the problem. Multiple pictures of the crawlspace, showing water marks on the foundation piers and the like, were introduced into evidence.

In October 2000, Mr. Willett installed a garage apron and placed a cap on it, which appellant had refused to install, and also completed grading of the lot. This work cost $2050. In the spring of 2001, Mr. Willett installed a new curtain drain along the east side of the house, and replaced the soil and grass seed, which cost $1400. Drainage problems persisted, so Mr. Willett came back in 2002 to install footing and a foundation across the front of the garage, which had never been done in the construction of the house. Mr. Willett also

wrapped the whole house with a curtain drain to ensure that there would be no more water problems. Appellees paid Mr. Willett $7000 for this additional work. The total of Mr. Willett's fees was $10,450.

Mr. Huett testified that he understood that the garage and driveway sat upon shot rock, which rock is approximately six inches in diameter. Mr. Huett agreed that water readily flowed through shot rock and that the lot itself was sloped such that water flowed toward the house. Mr. Huett faulted the masonry work in the foundation, and he said that the water was primarily coming from under the garage into the crawl space. Mr. Huett said that the lack of footing or a foundation wall was not good practice; this left no protection. Mr. Huett described appellant's attempts at grading the lot to be "half-hearted." He said that appellant did not install the curtain drains as he had told him to. Mr. Huett agreed that appellant brought another engineer to trial to testify on his behalf, but Mr. Huett stated that appellant's expert did not have the opportunity to be out at the house when the water was actually accumulating. Mr. Huett's recommendations and sketches were entered into evidence.

Mr. Willett testified that in his thirty-two-year career as a general contractor, he had fixed thirty-five to forty drainage problems. Mr. Willett did not agree that the more economical drains were the best solution. He thought that the best attack was directly at the source. Nonetheless, he repaired the curtain drains. When this did not solve the problem, he installed proper footing and a foundation, filling in all the piers under the house. Mr. Willett observed the presence of shot rock throughout the underneath of the garage area. He said the shot rock was several inches in diameter. He said he found no evidence that the builder took any precautions to protect this house from water, where it sat in a natural drain. He characterized it as "incomplete workmanship" done to "save a few bucks." Mr. Willett thought that the patio concrete was poured to a tight fit, and he believed that Mr. Dickerson

did good work. He also said that he saw no evidence that water came down through a vent in the side of the house.

Appellant testified that he had built as a general contractor for about fifteen years, averaging ten homes a year. He agreed he put shot rock underneath the garage and packed it down with a dozer, but he said he "knocked down" the shot rock to one-and-three-quarter inch size so it would pack. He agreed that he responded to appellees' complaints in May 2000, first creating a hole and installing a pipe in the foundation and later installing the curtain drain. After going out to the house and working on the problem five or six times, appellant agreed he stopped his efforts. Appellant believed that the triangular patio concrete tilted toward the house sending water underneath the house; that someone damaged the down-spout in the process of installing the patio, which he later repaired; and that appellees had added dirt to the property, sloping the run-off toward the house. Because of these three things, appellant faulted appellees for the persistent water problem. However, appellant agreed upon cross examination that "it's not good workmanship for a house's crawl space to fill up with water." He also agreed that after he fixed the down-spout, the water problem persisted.

Appellant's brother Everett Parks testified that he also believed that the concrete patio sloped toward the house because he placed a level onto the patio. He said that this triangle space of dirt had been left open for a flower bed. Everett confirmed that when they finished the house in July 1999, the down-spout was draining into the drain line under the sidewalk, but the next spring, the down-spout was pouring onto the concrete.

Appellant called a civil engineer, Victor Sanchez, to the stand. Mr. Sanchez was hired in late 2002 or early 2003 to inspect the premises. He opined that most of the water was coming in through a vent or through the area adjacent to the concrete patio, which he thought

sloped toward the house. Mr. Sanchez based that opinion on his viewing of the high water marks on the piers under the house. He was unaware of the material used under the concrete garage and driveway, and he agreed that if aggregate were there, water could easily drain into the crawl space. Mr. Sanchez agreed that it was poor design not to have a footing underneath the garage.

Mr. Dickerson testified that he poured the concrete patio, leveling it away from the house. He confirmed this by using a level prior to pouring the concrete, and then testing the flow of water after it was poured by running water from a hose atop the patio. Mr. Dickerson said that the sidewalk tilted toward the house, based upon him setting a level on it.

Each attorney presented a closing argument. The trial court took the case under advisement. After trial, appellees submitted a motion for attorney's fees in the amount of $11,470.36, attaching the entirety of their attorney's billing statements. Appellant resisted the award of attorney fees, arguing that appellees were not yet the prevailing party, and in any event, the requested fee was excessive in relation to the damages sought. In January 2005, the trial judge rendered his decision by letter opinion finding in favor of appellees and against appellant.

The burden of proof in a bench trial is by a preponderance of the evidence. *Chavers v. Epsco, Inc.*, 352 Ark. 65, 98 S.W.3d 421 (2003). On appeal, we reverse findings of fact by the trial court only upon a determination that the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. Such findings are clearly erroneous when, although there is some evidence to support them, the appellate court is left with a distinct and firm conviction that a mistake was committed. *See Bendinger v. Marshalltown Trowell Co.*, 338 Ark. 410, 994 S.W.2d 468 (1999). However, resolution of

conflicts in the evidence and the determination of credibility is left to the fact finder, not the appellate court. *See Raiborn v. Raiborn*, 254 Ark. 711, 495 S.W.2d 858 (1973). This standard of review applies to appellant's first argument on appeal. Appellant contends that his witnesses were more credible regarding whether it was appellant's or appellees' fault that a drainage problem existed. We cannot agree with appellant.

The pertinent findings on this issue were set out in the letter opinion. The judge recalled that this was a full two-day bench trial and that he took down twenty-five pages of notes while hearing the case. The judge also recited that he studied each side's trial briefs, the more than fifty exhibits introduced at trial, and took approximately three days to research and consider the issues. He rendered findings that he was "substantially more convinced by the testimony and evidence presented by the Plaintiffs [appellees] as to the cause of the problem;" that the builder should have recognized and identified the natural drainage problem on this parcel of land and built the home with appropriate man-made drainage to compensate; that despite appellant's initial good-faith efforts to fix the problem with installation of a curtain drain among other measures, those efforts were unsuccessful; and that appellant was responsible for the costs appellees incurred to stop the drainage problem once and for all.

Appellant argues on appeal that these findings are clearly against the preponderance of the evidence. Appellant asserts that the facts in this case "are quite complicated" and that because of "the totality and enormity of this case and conflicting testimony," appellees failed to meet their burden of proof on the cause of the drainage problem. We disagree. To the extent that there were conflicts in the testimony, and there were many, this was an issue for the trial court to resolve, not our court. We are not at liberty to pick and choose the more compelling witnesses, nor is the sheer number of witnesses or pieces of evidence the

deciding factor. Appellees presented ample evidence that, if believed, supports the trial court's findings by a preponderance of the evidence. We affirm this point on appeal.

The second issue on appeal concerns the award of attorney fees to the prevailing party. All parties agree that there is statutory authority in Ark. Code Ann. § 16-22-308 (Supp. 2005) to award such fees. The gravamen of appellant's argument is that it was an abuse of discretion to award fees of $11,470.36 when the damage award was only $10,450. Appellant states in his brief on this issue that "this case did not involve a complex or novel subject matter." Appellant does not contest the hourly rate charged or whether all of the billing was related to this particular case. We disagree that appellant has demonstrated an abuse of discretion in this instance.

A trial court is not required to award attorney fees, and because of the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing party's counsel, appellate courts generally recognize the superior perspective of the trial judge in determining whether to award such fees. *See Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000). Appellant sets forth the relevant factors to consider when determining an award of attorney's fees. *See*, *e.g.*, *Phelps v. U.S. Credit Life Ins. Co.*, 340 Ark. 439, 10 S.W.3d 854 (2000). The amount of the fee is a discretionary decision. *See Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998). We will not disturb the trial judge's decision absent an abuse of discretion. *See Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

The trial court awarded the full amount sought, which was supported by detailed billing statements from June 2000 through the trial conducted in July 2004. The trial judge noted in his letter opinion that both attorneys were well prepared and very capable. The trial judge determined that appellees' attorney's billing was well documented, that the billing was

reasonable in light of the great deal of time and effort expended for this case, and that the fees would be granted pursuant to appellees having prevailed on their contract-based suit. We are hard pressed to hold that the trial court's decision constitutes an abuse of discretion, particularly where in point one of appellant's brief, he states how complicated this case was. We affirm the discretionary decision to award this attorney fee. *See Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993).

We affirm.

PITTMAN, C.J., and BAKER, J., agree.